

NEWS



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State of New Jersey
Department of Labor
PO Box 110
Trenton, New Jersey
08625-0110

Notice of Proposed Amendment

RE:

**DIVISION OF WORKERS' COMPENSATION
Rules of the Division of Workers' Compensation
Asbestos Exposure Claims Under N.J.S.A. 34:15-33.3;
Certification to the Uninsured Employer's Fund
Medical Information in Asbestos Exposure Cases
Proposed New Rules: N.J.A.C. 12:235-7.8 and 7.9**

Attached please find the above-referenced matter which was published in the July 6, 2004 New Jersey Register.

If you have any questions, please contact Frederick S. Cohen, Regulatory Officer at (609) 777-2960.

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Attachment

LABOR

(a)

DIVISION OF WORKERS' COMPENSATION

**Rules of the Division of Workers' Compensation
Asbestos Exposure Claims Under N.J.S.A. 34:15-33.3; Certification to the Uninsured Employer's Fund Medical Information in Asbestos Exposure Cases**

Proposed New Rules: N.J.A.C. 12:235-7.8 and 7.9

Authorized By: Albert G. Kroll, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e), 34:1A-12(b) and (c), 34:15-33.3 and 34:15-64.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2004-262.

A public hearing on the proposed new rules will be held on the following date at the following location:

Tuesday, July 27, 2004
10:00 A.M. to 12:00 noon
New Jersey Department of Labor
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey 08625

Please call the Office of Regulatory Services (609) 984-3620 if you wish to be included on the list of speakers.

Submit written comments by September 4, 2004 to:

Frederick S. Cohen, Regulatory Officer
Office of Regulatory Services
New Jersey Department of Labor
13th Floor, Suite G, PO Box 110
Trenton, New Jersey 08625-0110
Fax: (609) 292-8246

If you need this document in Braille, large print or audio cassette, contact the Office of Communications at (609) 292-3221 or NJ Relay (TTY) 1-800-852-7899.

The agency proposal follows:

Summary

This rule proposal sets forth two new rules to be added to the rules of the Division of Workers' Compensation. Pre-proposal review and discussions have been held with interested parties including the Commissioner of Labor's Advisory Council on Workers' Compensation. Proposed N.J.A.C. 12:235-7.8 and 7.9 are designed to help implement the recently enacted N.J.S.A. 34:15-33.3 which relates to workers' compensation claims arising from occupational disease that resulted in injury or death from exposure to asbestos. Moreover, the proposed new rules will allow employees with workers' compensation claims pending on, or filed after, January 14, 2004, to seek benefits from the Uninsured Employer's Fund (UEF) where the employee has been injured or has died due to asbestosis or asbestos-induced cancer. The latter includes mesothelioma, and when the employee or the dependents of a deceased employee, after due diligence, cannot reasonably identify or locate the workers' compensation insurance carrier(s) of the employer(s), the employer(s), or the principals of the employer(s) where the employee was last exposed to asbestos. Under proposed N.J.A.C. 12:235-7.8(a)4, compensation will be based on the last date of exposure, if known, or if the last date cannot be known, then it will be based upon an appropriate date established by the Judge of Compensation before whom the case in question is heard.

Additionally, proposed N.J.A.C. 12:235-7.8(b) sets forth the due diligence standard that is required from the petitioner or petitioner's attorney before an application is to be filed for compensation from the UEF under the statute. Specifically, the certification that is required, pursuant to N.J.A.C. 12:235-7.9, must include the particulars of the reasonable efforts made, given the particular facts and circumstances of the case, to identify and locate all employers, principals of employers, and compensation carriers where the employee had been exposed to asbestos. Under paragraphs (b)1 through 7, such efforts shall include, but not be limited to, inquiries made to the Compensation Rating and Inspection Bureau, inspection of State, county and

municipal business records, acquisition and review of union records, review of tax returns and Social Security earnings histories, review of medical records and review of personal records kept by the employee. The proposal also recites under N.J.A.C. 12:235-7.8(c) that the UEF retains its subrogation and lien rights including those permitted pursuant to N.J.S.A. 34:15-33.3(b) and (c).

Moreover, proposed N.J.A.C. 12:235-7.9 specifies the additional medical and/or work information which needs to be provided to the UEF when the petitioner's claim is based upon asbestos exposure(s). This information is an addition to the general UEF certification information requirements as set forth in N.J.A.C. 12:235-7.3. Under proposed N.J.A.C. 12:235-7.9(a)1 through 12, the information that the petitioner, or the petitioner's attorney, must provide to the UEF as part of the certification in support of an asbestos exposure claim includes: data about third-party actions or latent disease claims; date of manifestation of the disease; dates of discovery, disclosure, or diagnosis; rate of progression of the disease; dates of disability due to the disease; dates of lost time related to the disease; the nature of any pre-existing conditions; the medical basis for concluding that there was a casual relationship between work exposures and the disease; the efforts made to comply with proposed N.J.A.C. 12:235-7.8(b) requiring due diligence; the dates and nature of employment during which the employee was exposed to asbestos and, the nature and extent of any future treatment for the disease. However, subsection (b) provides that if any of these items of information are not provided to the UEF, the petitioner or the petitioner's attorney shall explain why such information has not been submitted. The UEF may require additional efforts to obtain such information. In addition to the information required by subsection (a) of this proposed rule, subsection (c) thereof requires that the petitioner provide the UEF with all medical records and information related to the asbestos exposure claim.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The recently enacted N.J.S.A. 34:15-33.3 requires that the Commissioner of Labor formulate regulations to implement the statute. The proposed rules will have a positive social impact since they provide guidance to workers' compensation claimants, the survivors thereof and their attorneys on the methodology of pursuing an asbestos-related claim with the Division of Workers' Compensation. Moreover, the proposed rules also codify UEF requirements relating to the fair and uniform treatment of parties who are seeking benefits from the UEF under the asbestos exposure statute.

Economic Impact

The proposed rules will affect the UEF and certain petitioners who have had difficulty receiving compensation in asbestos-related disability cases and are likely to add costs to the workers' compensation case process. While petitioners or petitioners' attorneys will incur costs to file the certification and documentation with the UEF in relation to these specific asbestos exposure claims, such injured workers or their dependents will recover benefits that were hitherto unavailable from last employers or carriers who could not be located or identified. In addition, the new statute and rules could increase the UEF's workload to such extent that additional UEF staff may need to be hired in the future. No such hirings are presently anticipated and will depend on the volume of cases filed. If UEF expenses and compensation paid from the UEF increase, the UEF surcharge paid by employers to cover UEF expenses pursuant to N.J.S.A. 34:15-120.1 may need to be increased. At present, such costs cannot be quantified.

Federal Standards Statement

A Federal standards analysis is not required because the proposed rules are not subject to any Federal requirements or standards.

Jobs Impact

The proposed rules will have no impact on jobs, including the generation or loss of jobs.

Agriculture Industry Impact

The proposed rules will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

There will be an impact on businesses in this State, including small businesses as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Thus, as heretofore noted, the processing of workers' compensation cases which are asbestos-related will increase; specifically, claimants and counsel will have to absorb those costs associated with the

filing with the UEF of the certifications and documentation required under these proposed rules. Those costs, however, will be offset by the fact that claimants and counsel can now obtain recompense from those previous employers or insurance carriers which had not heretofore been reachable. Thus, the financial costs will, in effect, thereby be ameliorated, or in some cases, completely vitiated by the awards received. In addition, should the proposed rules, and the statute upon which they are premised, generate a significant increase in the workload of the UEF, the Division of Workers' Compensation would have to consider hiring additional workers to handle the larger volume. In that case, it is possible that the surcharge paid by employers to the UEF to cover its expenses might have to be increased.

Smart Growth Impact

The proposed rules will not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

12:235-7.8 Asbestos exposure claims under N.J.S.A. 34:15-33.3

(a) After due diligence, as defined in (b) below, an application may be filed with the UEF for compensation for asbestosis or asbestos-induced cancer, including mesothelioma, resulting in injury or death from exposure to asbestos where:

1. The workers' compensation insurance carrier of the employer, the employer, or the principals of the employer where the employee was last exposed cannot be located or the employee worked for more than one employer during the time the exposure to asbestos may reasonably be deemed to have taken place but the employer or employers where the employee was last exposed cannot reasonably be identified; and

2. The claim petition was pending on or filed after January 14, 2004 and had not been concluded or dismissed prior to that date; and

3. Compensation is based on the last date of exposure if known, or if such date cannot be known, on an appropriate date established by the judge of workers' compensation, pursuant to N.J.S.A. 34:15-33.3(d).

(b) "Due diligence" shall be defined as a reasonable effort on the part of the petitioner or the petitioner's attorney, given the particular facts and circumstances of the case, to determine the identities and locations of all employers, the principals of the employers, and their compensation insurance carriers if not self-insured, where the employee has been exposed to asbestos. Such efforts shall be listed in the certification required under N.J.A.C. 12:235-7.9 and shall include, but not be limited to:

1. Inquiries made to the Compensation Rating and Inspection Bureau to ascertain the workers' compensation insurance coverage of all applicable employers for the period or periods during which the employee was exposed to asbestos;

2. Inspection of State, county and municipal records on corporations and business entities, as well as the principals of such entities, by which the employee may have been employed during the period or periods during which the employee was exposed to asbestos;

3. Acquisition and review of any labor union records maintained for the employee;

4. Review of the employee's Federal and state income tax returns for the period or periods during which the employee was exposed to asbestos;

5. Acquisition and review of the employee's Social Security earnings history for the period or periods during which the employee was exposed to asbestos;

6. Review of the employee's medical records during and subsequent to the period or periods during which the employee was exposed to asbestos; and

7. Review of any personal records maintained by the employee with respect to employment during the period or periods during which the employee was exposed to asbestos.

(c) In (a) above, the UEF shall have subrogation and lien rights including those provided by N.J.S.A. 34:15-33.3(b) and (c).

12:235-7.9 Certification to the UEF, medical information in asbestos exposure cases

(a) In addition to the items specified at N.J.A.C. 12:235-7.4 for certification to the UEF, the petitioner shall, in asbestos exposure claims

under N.J.A.C. 12:235-7.8, provide the following as part of such certification:

1. Identification of all third-party actions or latent disease claims filed by or on behalf of the employee based upon exposure(s) to asbestos, including the names of the defendants and the courts in which such actions are pending or were concluded;

2. Date of manifestation of the employee's asbestosis or asbestos-induced cancer;

3. Date of discovery, disclosure or diagnosis of the employee's asbestosis or asbestos-induced cancer and its relation to the ability of the employee to work;

4. Rate of progression of the employee's asbestosis or asbestos-induced cancer;

5. Date(s) the employee was impaired or unable to work as a result of the asbestosis or asbestos-induced cancer;

6. Date(s) of any lost time for medical treatments related to asbestosis or asbestos-induced cancer;

7. Nature of pre-existing pulmonary conditions, cancer-related conditions, exposure to any other chemicals, and/or smoking history;

8. Medical basis for concluding that there is a causal relationship between the employee's work history and the employee's asbestosis or asbestos-induced cancer;

9. Medical conditions pre-existing the alleged exposure(s) to asbestos, including the nature of the pre-existing condition(s), the date(s) and type(s) of medical treatment received, and the names and addresses of all medical practitioners and providers involved in the diagnosis and treatment of such condition(s);

10. Details of efforts made under the provisions of N.J.A.C. 12:235-7.8(b);

11. Dates and nature of employment during which the employee was exposed to asbestos or during which the employee was exposed to conditions which aggravated or contributed to the asbestosis or asbestos-induced cancer. Such information should include, but not be limited to, any OSHA, employer, union, or other environmental reports giving evidence of the level of exposure to asbestos and how such levels exceeded those encountered in the general environment; and

12. Nature and extent of any future treatment for the employee's asbestosis or asbestos-induced cancer.

(b) If any of these items of information are not provided to the UEF, the petitioner or petitioner's attorney shall explain why such information has not been submitted. The UEF may require additional efforts to obtain such information.

(c) In addition to the information required under the provisions of this rule in (a) above and under N.J.A.C. 12:235-7.4, the petitioner shall provide the UEF with all medical records and information related to the asbestos exposure claim.